Supreme Court, U.S.
FILED

(1) 011187 FEB 12 2002

OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

NORCAL WASTE SYSTEMS, INC. and NORCAL WASTE SYSTEMS, INC. EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,

Petitioners,

v.

JULIO ABRAHAM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JEROME B. FALK, JR.
Counsel of Record
BARBARA A. WINTERS
DOUGLAS A. WINTHROP
KEITH KESSLER
HOWARD, RICE, NEMEROVSKI, CANADY, FALK & RABKIN
A PROFESSIONAL CORPORATION
Three Embarcadero Ctr., 7th Fl.
San Francisco, CA 94111-4065
(415) 434-1600

PAUL J. ONDRASIK, JR.
STEPTOE & JOHNSON, LLP
1330 Connecticut Ave., N.W.
Washington, DC 20005
(202) 429-3000

Counsel for Petitioner Norcal Waste Systems, Inc.

DEBORAH S. BALLATI
KAREN P. KIMMEY
FARELLA, BRAUN & MARTEL, LLP
235 MONTGOMERY ST.
SAN FRANCISCO, CA 94110
(415) 954-4400

Counsel for Petitioner Norcal Waste Systems, Inc. Employee Stock Ownership Plan and Trust

February 2002

64pp

QUESTIONS PRESENTED

1. Can state law impose on ERISA-regulated plan administrators fiduciary duties governing their management and investment decisions that are different from or additional to the fiduciary duties imposed by ERISA?

2. Does ERISA completely preempt a state law claim for breach of fiduciary duty, brought against an ERISA fiduciary by a participant in an ERISA-regulated plan, complaining of management and investment decisions made by that fiduciary?

PARTIES TO THE PROCEEDING

1. Norcal Waste Systems, Inc. and the Norcal Waste Systems, Inc. Employee Stock Ownership Plan and Trust are the Petitioners herein and were originally Defendants (and later, Intervenors) below.

2. Bank of America is being served as a Respondent herein (and is filing its own petition for a writ of *certiorari*) and was originally a Defendant (and later a Cross-Defendant and a Cross-Claimant in Intervention) below.

3. Julio Abraham, *et al.* are Respondents herein and were the Plaintiffs below. The 146 Plaintiff-Respondents not set forth in the caption are listed in the Appendix at pages 26a–27a.

RULE 29.6 DISCLOSURE

Petitioner Norcal Waste Systems, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 DISCLOSURE	ii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	5
A. Statutory Framework.	5
B. Statement Of Facts.	7
C. Proceedings Below.	9
REASONS FOR GRANTING THE PETITION	12
A. ERISA Completely Preempted The ESOP Participants' State Law Claim For Breach Of Fiduciary Duty.	12
B. The Ninth And Fifth Circuits' Preemption Holdings Conflict With Those Of Five Other Circuits.	19

TABLE OF CONTENTS

		Page
1.	In The Sixth And Third Circuits, ERISA Preempts Any State Law Claim Concerning An ERISA Plan Between Parties In An ERISA-Regulated Relationship.	20
2.	The Second Circuit Has Rejected The "Dual Capacity" Analysis Used By The Ninth Circuit, Holding That ERISA Preempts Claims Based On Contractual Relationships Existing Before The ERISA Relationship.	22
3.	The Seventh And Eighth Circuits Have Held Preempted State Law Claims By ERISA Plan Participants Against Plan Administrators Based On Assertedly Parallel State Law Relationships.	23
C.	The Ninth Circuit's Opinion Undermines A Core Purpose Of ERISA By Making Unclear The Duties And Potential Liability Of Those Who Manage The Assets Of Hundreds of Thousands Of Pension Plans.	25
CONCLUSION		26

TABLE OF AUTHORITIES

	Page
Cases	
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981)	5
Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073 (7th Cir. 1992)	23
Bast v. Prudential Ins. Co. of Am., 150 F.3d 1003 (9th Cir. 1998)	15
Boggs v. Boggs, 520 U.S. 833 (1997)	2
Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A., 519 U.S. 316 (1997)	2, 17
De Buono v. NYSA-ILA Med. & Clin. Servs. Fund, 520 U.S. 806 (1997)	2, 17
Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2001)	2
General American Life Insurance Co. v. Castonguay, 984 F.2d 1518 (9th Cir. 1993)	17, 18, 19
Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc., 93 F.3d 1171 (3rd Cir. 1996)	19, 21
Hull v. Fallon, 188 F.3d 939 (8th Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000)	19, 23, 24
Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990)	5, 6

TABLE OF AUTHORITIES

Page

Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996) 19, 23, 24

Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992) 16

Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 62–64 (1987) 7

Moench v. Robertson, 62 F.3d 553 (3rd Cir. 1995) 6

N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) 2, 3, 6, 17, 22, 26

Pegram v. Herdrich, 530 U.S. 211 (2000) 3, 13, 14

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 5

Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson, 201 F.3d 1212 (9th Cir.), *amended by* 208 F.3d 1170 (9th Cir.), *cert. denied*, 531 U.S. 992 (2000) 7, 15

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 17

Smith v. Dunham-Bush, Inc., 959 F.2d 6 (2d Cir. 1992) 19, 22, 23

Smith v. Provident Bank, 170 F.3d 609 (6th Cir. 1999) 19, 20, 21

Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456 (5th Cir. 1986) 12, 19

TABLE OF AUTHORITIES

	Page
Toumajian v. Frailey, 135 F.3d 648 (9th Cir. 1998)	7, 17
UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358 (1999)	2
Varity Corp. v. Howe, 516 U.S. 489 (1996)	6, 15

Statutes

28 U.S.C.	
§1254(1)	1
§1367	7
29 U.S.C.	
§1001(a)	5
§1001(b)	6
§1002(2)	8
§1002(21)(A)	6
§§1021–31	5
§§1051–61	5
§§1081–86	5
§§1101–14	5, 25
§1104	8, 10
§1104(a)(1)	13
§1104(a)(1)(B)	6
§1107(d)(6)(A)	5
§1109(a)	1, 6
§§1131–47	5
§1132(a)	1, 7
§1132(a)(2)	6
§1132(a)(3)	6
§1132(e)(1)	25
§1144(a)	1, 7
ERISA	
§2(a)	5

TABLE OF AUTHORITIES

	Page
§2(b)	6
§3(2)	8
§3(21)(A)	6
§§101–111	5
§§201–211	5
§§301–308	5
§§401–414	5, 25
§404	8, 10
§404(a)(1)	13
§404(a)(1)(B)	6
§407(d)(6)(A)	5
§409(a)	1, 6
§§501–517	5
§502	14
§502(a)	1, 7
§502(a)(2)	6, 14, 15
§502(a)(3)	6, 14, 15
§502(e)(1)	25
§514(a)	1, 7
29 C.F.R. §2509.94–2(1)	16

Other Authorities

H.R. COMM. ON EDUCATION & LABOR, H.R. REP. No. 93–533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639	5, 16
H.R. CONF. REP. No. 93–1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038	17
Http://www.the–esop–emplowner.org/pubs/stats.html (visited Feb. 8, 2002)	25
Robert N. Eccles, "Fiduciary Litigation Under ERISA," in *ERISA Fiduciary Law* 400	

TABLE OF AUTHORITIES

Page

(Susan P. Serota ed., 1995) 14, 15

U.S. Dep't of Labor, Pension & Welfare Benefits Admin. [PWBA], *Private Pension Plan Bulletin—Abstract of 1997 Form 5500 Annual Reports*, No. 10 (Winter 2001), *currently available at* http://www.dol.gov/dol/pwba/public/programs/opr/bullet97/cover.htm 25

U.S. Dep't of Labor, PWBA, *Fact Sheet—Changes in the Private Employment Based Pension and Health Systems Over the Past 25 Years* (Sept. 1999), *currently available at* http://www.dol.gov/dol/pwba/public/pubs/factsht2.htm 25

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, entered on September 7, 2001 and reported at 265 F.3d 811, appears in the Appendix at pages 1a–20a. A transcript of the District Court's unreported oral ruling denying Plaintiffs' motion to remand appears at pages 21a–22a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion on September 7, 2001. App. 1a. The Court denied Petitioners' timely petition for rehearing and suggestion of rehearing *en banc* on November 14, 2001. App. 23a–24a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns Sections 409(a), 502(a) and 514(a) of ERISA, 29 U.S.C. §§1109(a), 1132(a), 1144(a), which are reproduced in the Appendix at page 25a. *See generally* Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 832, as amended, 29 U.S.C. §§1001 *et seq.*

INTRODUCTION

This case presents a question of great significance to ERISA fiduciaries and the plans they administer: when investing or managing a plan's assets pursuant to ERISA fiduciary standards, can ERISA fiduciaries simultaneously be subject to different or additional fiduciary duties under state law? The Ninth Circuit has now held that they can, and that ERISA-protected plan participants thus can sue ERISA-regulated fiduciaries under state law for those fiduciaries' investment and management decisions, simply by alleging that those decisions breached fiduciary duties arising from a non-ERISA relationship between the parties such as, in this case, an "independent creditor relationship" arising under state law.

In so holding, the Ninth Circuit has ignored a fundamental tenet of this Court's ERISA preemption jurisprudence and created a conflict with decisions of five other Circuits. This conflict renders unclear the legal duties and potential liabilities of the fiduciaries who manage the more than 700,000 private pension plans in America, and merits review by this Court.

Given ERISA's importance to the nation's economy and workers (*Boggs v. Boggs*, 520 U.S. 833, 839 (1997)) and the "unhelpful text" of its preemption clause (*N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) ("*Travelers*")), this Court has reviewed 18 ERISA-preemption cases in the past two decades.[1] Despite this body of law, the issue here is the subject of a substantial disagreement between the Courts of Appeals. This case presents an important opportunity to resolve that

---

[1] *See Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 334 n.1 (1997) (Scalia, J., concurring) (listing 13 prior cases); *see also Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999); *Boggs v. Boggs*, 520 U.S. 833 (1997); *De Buono v. NYSA-ILA Med. & Clin. Servs. Fund*, 520 U.S. 806 (1997).

conflict and establish a clear, simple rule to guide lower courts in adjudicating disputes about the core of ERISA's exclusive domain. That is because, unlike most ERISA preemption cases that reach this Court, this one does not concern the myriad state laws that in some way merely "relate to" health care or other services paid for by employee welfare benefit plans. Rather, it implicates a central purpose of ERISA, and of its preemption and civil enforcement provisions in particular: to create uniform, exclusive federal standards of fiduciary responsibility for those who manage and direct the investments of employee retirement plans. *See Travelers*, 514 U.S. at 657 (Congress "intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation . . ." (quotation omitted)); *see also Pegram v. Herdrich*, 530 U.S. 211, 235 (2000) (ERISA fiduciaries must act with "an eye single" to interests of plan participants and beneficiaries (quotation omitted)). The Ninth Circuit's new rule, together with the Fifth Circuit opinion on which it relies, conflicts with decisions of five other Circuits and imperils that vital statutory objective.

The facts of this case illustrate the importance of the issue presented for those who manage ERISA plans. In 1986, an employee stock ownership plan sponsored by Norcal Solid Waste Systems, Inc. (the "Norcal ESOP") had acquired all the stock of Norcal from the company's employee-owners in exchange for cash and promissory notes issued by the ESOP; many of those noteholders were ESOP participants. In 1987, the ESOP's Administrative Committee was faced with an important question: should the Committee authorize a merger of the Norcal ESOP with an ESOP that owned all the stock in Norcal's local competitor (followed by a merger of Norcal and the competitor)?

The decision implicated competing concerns. On the one hand, the merger would increase the long-term value of the stock owned by the Norcal ESOP by preventing the impending acquisition of Norcal's competitor by a large national

company that, upon gaining a foothold in the local market, could drive Norcal out of business. On the other hand, the merger would significantly increase the Norcal ESOP's (and Norcal's) short-term debt, which could, among other things, potentially impair the ESOP's ability to make payments on the ESOP notes.

In making that decision, what standard(s) define the Committee's fiduciary duties? The significant fiduciary duties that the Committee owes the ESOP and its participants under ERISA require it to approve proposed transactions that it believes are in *their* best interests. But what if (as Plaintiffs alleged here) the transactions are *not* also in the best interests of the *holders of the ESOP notes*? Do the Committee's fiduciary duties differ as to the subset of ESOP participants who are noteholders, and whose relative preferences for short-term risk and long-term reward thus may differ from those of the other ESOP participants? Can state law impose upon the Committee different or additional fiduciary duties with respect to the investment-management decision it is called upon to make—in this case, a duty to *reject* transactions that the fiduciary duties imposed by ERISA would otherwise obligate it to *approve*? Under the opinion below, when making its decision, the Committee must consider *both* its ERISA-imposed fiduciary duties *and* the potentially conflicting fiduciary duties imposed by state law.

That framework of dual fiduciary duties and laws now applied in the Fifth and Ninth Circuits imposes unfair burdens on ERISA fiduciaries and conflicts with opinions in the Second, Third, Sixth, Seventh and Eighth Circuits. Those five Circuits have held that if an act by an ERISA fiduciary is subject to ERISA, the act cannot also be subject to state law: ERISA will preempt any claim for breach of a state law duty that might otherwise apply to that same act. And in one of those Circuits, ERISA so thoroughly occupies the field of fiduciary duties regarding plans as to preempt state law claims for breach of fiduciary duty even against parties who are *not* fiduciaries under ERISA. This conflict has important

consequences for hundreds of thousands of ERISA fiduciaries and the plans they administer, and merits review by this Court.

STATEMENT OF THE CASE

A. Statutory Framework.

In 1974, after a decade of studies of America's private pension system, Congress enacted ERISA, a "massive undertaking" (*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987)) whose "primary purpose . . . is the protection of individual pension rights." H.R. COMM. ON EDUCATION & LABOR, H.R. REP. No. 93–533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639; *see also* ERISA §2(a), 29 U.S.C. §1001(a) (stating intent to provide "minimum standards . . . assuring the equitable character of [employee benefit] plans and their financial soundness").

ERISA governs, among other things, reporting and disclosure of plan information (§§101–111, 29 U.S.C. §§1021–31), participation limits and vesting (§§201–211, 29 U.S.C. §§1051–61), plan funding (§§301–308, 29 U.S.C. §§1081–86), fiduciary duties (§§401–414, 29 U.S.C. §§1101–14), and administration and enforcement (§§501–517, 29 U.S.C. §§1131–47). An employee stock ownership plan, or ESOP, is a type of ERISA-regulated employee pension benefit plan "designed to invest primarily in qualifying employer securities." §407(d)(6)(A), 29 U.S.C. §1107(d)(6)(A).

Among its "'essential tools,'" ERISA includes a "'carefully integrated' civil enforcement scheme" meant to afford "the exclusive remedy for rights guaranteed under ERISA" (*Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137, 144 (1990) (quoting *Pilot Life Ins.*, 481 U.S. at 54, 52) and a "deliberately expansive" preemption clause "designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life*, 481 U.S. at 46 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)). Congress intended those provisions

> to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . , [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. (*Travelers*, 514 U.S. at 656–57 (quoting *Ingersoll-Rand*, 498 U.S. at 142))

Fiduciary responsibility is a key area in which Congress pursued its goals of employee protection and legal uniformity. It did so "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." §2(b), 29 U.S.C. §1001(b).

After defining who is a plan fiduciary in broad, functional terms (§3(21)(A), 29 U.S.C. §1002(21)(A)), ERISA prescribes strict standards of loyalty and care for those fiduciaries, requiring them to act "*solely* in the interest of [a plan's] participants and beneficiaries" and with "care, skill, prudence, and diligence." §404(a)(1)(B), 29 U.S.C. §1104(a)(1)(B) (emphasis added). With a few exceptions, ESOP fiduciaries have the same duties as other ERISA fiduciaries. *See Moench v. Robertson*, 62 F.3d 553, 569 (3rd Cir. 1995).

If a fiduciary breaches those duties, ERISA's civil-enforcement scheme authorizes a plan participant, *inter alia*, to bring a civil action "for appropriate relief" (§502(a)(2), 29 U.S.C. §1132(a)(2)), including restoration to the plan of any loss or improper profit and other "equitable or remedial relief" (§409(a), 29 U.S.C. §1109(a)), or for individual equitable relief. *See Varity Corp. v. Howe*, 516 U.S. 489, 509–12 (1996) (discussing §502(a)(3), 29 U.S.C. §1132(a)(3)).

These remedies for a plan fiduciary's breach of duties are exclusive: ERISA's preemption clause "supersede[s] any and all State laws insofar as they . . . relate to any employee

benefit plan." §514(a), 29 U.S.C. §1144(a). Moreover, its civil-enforcement provisions (§502(a), 29 U.S.C. §1132(a)) *completely* preempt any purportedly state law–based claim that could be asserted under those provisions, requiring a court to "recharacterize" such a claim as actually "arising under federal law" and thus subject to removal. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 62–64 (1987).

The doctrines of preemption and complete preemption describe two concentric circles: a broad outer ring of state law claims that merely "relate to" a plan and thus are subject to a preemption defense, and a narrower core of claims asserted to be based on state law that actually fall within ERISA's civil enforcement scheme and are therefore completely preempted. *See id.*; *Toumajian v. Frailey*, 135 F.3d 648, 654–55 (9th Cir. 1998). As the Ninth Circuit acknowledged, where ERISA completely preempts *any* state law-based claim asserted by some (though not necessarily all) of the plaintiffs against some (though not necessarily all) of the defendants, then the entire case is removable and the District Court may exercise supplemental jurisdiction over the other claims and parties if appropriate under 28 U.S.C. §1367. App. 6a–9a, citing *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1215 (9th Cir.), *amended by* 208 F.3d 1170 (9th Cir.), *cert. denied*, 531 U.S. 992 (2000). Such was the case here.

B. Statement Of Facts.

In the 1920s, a group of Italian immigrants formed a cooperative to collect refuse in San Francisco neighborhoods. That cooperative was the predecessor of what ultimately became Norcal Waste Systems, Inc. ("Norcal"). 1 ER 1 ¶¶7, 38. From its inception through 1986, the company followed a tradition of strict employee ownership: only those who worked the company's routes (or their heirs) could acquire its stock. *Id.* ¶¶3, 12, 38.

As of 1986, current and former Norcal employees (and their heirs) still owned all of the company stock. *Id.* ¶¶3, 38. Because of the illiquidity of the stock and the age of most of the shareholders—most had retired or were close to retirement—Norcal created an employee stock ownership plan (the "Norcal ESOP") as the first stage in a plan to continue the tradition of employee ownership while allowing the shareholders to obtain immediate cash for their stock by selling it to the ESOP. *Id.* ¶13, 39–40. Upon the Norcal ESOP's formation, everyone then employed by Norcal became an ESOP participant. *Id.* at 57 ¶4.

The Norcal ESOP is an ERISA-regulated pension plan, managed by an Administrative Committee (the "ESOP Committee") appointed by Norcal's Board of Directors. §3(2), 29 U.S.C. §1002(2); 1 ER 1 ¶36. The ESOP Committee's members owe fiduciary duties under ERISA to all ESOP participants. *See* §404, 29 U.S.C. §1104.

In December 1986, the ESOP Committee approved the ESOP's purchase of all of the Norcal stock from the current or former Norcal employees for a combination of cash and non-recourse subordinated notes (the "Notes") issued by the ESOP (the "Acquisition"). 1 ER 1 ¶3, 46–47, 55. Norcal borrowed money and loaned it to the ESOP for the cash payment. *Id.* ¶41–44. The ESOP was to make quarterly payments on the Notes using dividends from and contributions by Norcal. *Id.* ¶¶47, 62. After the Acquisition, the ESOP owned all of the shares of Norcal.

A year later, in 1987, the ESOP Committee members voted to merge the Norcal ESOP with the ESOP of Norcal's local competitor, Envirocal, Inc. (the "Envirocal ESOP Merger"). That merger, followed by a merger of the two companies, created a combined company owned by the Norcal ESOP, thereby averting Envirocal's impending acquisition by a national conglomerate that, upon gaining access to the local market, could drive Norcal out of business. *Id.* ¶¶56, 58.

Three years later, in 1990, the ESOP Committee voted to merge the Norcal ESOP with an ESOP that owned all the shares of Excel Environmental Inc. (the "Excel ESOP Merger"), which resulted in the Norcal ESOP owning Excel. *Id.* ¶59. Norcal and the Norcal ESOP took on additional debt in the two merger transactions. *Id.* ¶¶56, 59.

The ESOP defaulted on the Notes in April 1991, and this litigation followed. *Id.* ¶¶61–62.

C. Proceedings Below.

Plaintiffs are 147 of the shareholders who sold their Norcal stock to the Norcal ESOP in the 1986 Acquisition and held ESOP notes. *Id.* ¶3, 11. At the time of the Acquisition, forty-four of the Plaintiffs were still employed by Norcal and thus were plan participants (the "ESOP Participants"). *Id.* at 64 ¶¶3, 20. Plaintiffs filed this action in California state court. At the same time, the ESOP Participants filed a suit under ERISA in federal court against some of the same defendants sued in state court.

Both suits primarily challenged the Envirocal and Excel ESOP Mergers, alleging that in these transactions, Norcal incurred heavy debt that, in time, left it unable to provide the ESOP funds to make payments on the ESOP Notes. In the federal action, the ESOP Participants claimed that in connection with these transactions, the defendants (including members of the ESOP Committee) had breached ERISA fiduciary duties owed to them as plan participants. *Id.* at 57 ¶¶15–19. In the state court action, Plaintiffs claimed, *inter alia*, that in connection with these transactions, the defendants (including members of the ESOP Committee) had breached state law fiduciary duties owed to them as holders of the Notes.[2] *Id.* at 1 ¶¶98–101. In particular, Plaintiffs

---

[2]In the proceedings below, Petitioners contended—and the District Court held—that ERISA also completely preempted two other claims (constructive fraud and negligence) premised on purported state law (continued . . .)

alleged that in approving these transactions, the ESOP Committee members breached "a fiduciary duty [owed] to plaintiffs as shareholders" under state law that "continued on after [the Acquisition]." *Id.* ¶98.

The ESOP Committee members owed the ESOP Participants fiduciary duties under ERISA (as the ESOP Participants admitted in their federal suit). *Id.* at 57 ¶¶8–9, 19. *See* §404, 29 U.S.C. §1104. Accordingly, believing that at least one of the state law duty–based claims asserted against the ERISA fiduciaries was completely preempted as to the ESOP Participant Plaintiffs, Petitioners removed the state case to federal court. 1 ER 64. The Removal Notice stressed that certain of the ESOP Committee members had been "sued solely as members of that Committee." *Id.* ¶6.

Plaintiffs filed a motion to remand, which the District Court denied. App. 21a–22a. The District Court held that ERISA preempts "common-law causes of action [that] could or would, directly or indirectly, interfere with the relationships that are re[gu]lated by ERISA; in essence, by creating duties on the part of ESOP defendants that could be potentially inconsistent with the duties imposed by ERISA." *Id.* at 22a.

Thereafter, the litigation continued for nearly five years.[3] After a three-week jury trial (*see* 5 ER 1136) and many dispositive rulings on motions, a final judgment was entered. 5

(. . . continued)
duties owed by the ESOP Committee to Plaintiffs. 1 ER 64 ¶¶12–13, 15–16. It is unnecessary to address those claims here because, as previously explained, the state case was removable if at least one claim was completely preempted. *See supra* at p.7. Because the state law breach of fiduciary duty claim conflicts most obviously with ERISA's fiduciary duty provisions, this Petition focuses on that claim and shows why ERISA preempted it.

[3]During that time, Norcal and the ESOP reached a settlement with Plaintiffs for over $36 million, which led to dispositive rulings—potentially nullified by the Ninth Circuit's decision—about the effect of the settlement and about Norcal's and the ESOP's asserted obligations to indemnify the remaining defendant, Bank of America.

ER 1111. Plaintiffs appealed (5 ER 1151), and defendant Bank of America cross-appealed (Nos. 99-17040, 99-17474).

In a published opinion, the Ninth Circuit held that the District Court had lacked jurisdiction, ordered the judgment vacated, and remanded the case with directions to remand to state court. App. 20a. After first noting the "confusion" and "differing analyses" of its efforts to define the limits of ERISA preemption (App. 10a), the Ninth Circuit concluded that this case satisfied neither of its prerequisites for ERISA complete preemption: (1) Section 514(a) did not afford a preemption defense to the state law claims, and (2) those claims could not be recharacterized as arising under Section 502(a) and thus completely preempted. App. 9a.

The court's conclusion rested on a theory that the ESOP Participants, along with the other Plaintiffs, were owed fiduciary duties in a "capacity" other than that of ESOP participant. App. 16a. The panel held that the ESOP Participants' state law claims arose from their "independent creditor relationship with the ESOP as a corporate entity based upon their status as former shareholders and current note holders" (*id.* at 13a)—not from their ERISA plan participant relationship with the ESOP—and that the ESOP Committee members were being sued "not . . . in their capacity as plan fiduciaries, but rather as the agents of the ESOP corporate entity that obtained Norcal shares from Plaintiff note holders." *Id.* at 16a. In analyzing these capacities, the panel held that "[s]tate law imposes duties upon [the ESOP Committee members] in that capacity [as corporate agents] only" (*id.*) and that the ERISA fiduciary duties owed to the plaintiffs who were ESOP participants are "parallel but independent to those owed to them as note holders." *Id.* at 15a. Based on this dual-capacity analysis, the panel concluded that the state law claims neither "relate to" the ESOP by encroaching on ERISA-regulated relationships (*id.* at 11a–17a), nor "fall within the scope of [ERISA] §1132(a) because those claims are based upon rights that arise under state law in their capacity as former shareholders of Norcal and current note

holders . . ., not upon any rights . . . conferred, enforced, or governed by ERISA." *Id.* at 18a.

The panel relied heavily on a Fifth Circuit case that employed a similar dual-capacity analysis: *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456 (5th Cir. 1986) (discussed in App. 14a–15a). There, a profit-sharing trust that owned employer stock sued an individual who was both a fiduciary of the trust and a director of the employer, alleging that as a fiduciary he had breached his fiduciary duty under ERISA, and that as a corporate director he had breached his state law fiduciary duty to the trust as shareholder. *Sommers*, 793 F.2d at 1458. Calling those duties "parallel but independent," the Fifth Circuit held that the state law claim escaped preemption because it "[did] not affect relations between the ERISA fiduciary and the plan . . . as such; [but] affect[ed] them in their separate capacities as corporate director and shareholder." *Id.* at 1468. The court dismissed as "remote" the risk that, while the state law and ERISA duties were "independent" in the abstract, they would "nevertheless saddle the director/fiduciary with inconsistent or conflicting requirements." *Id.*

REASONS FOR GRANTING THE PETITION[4]

A. ERISA Completely Preempted The ESOP Participants' State Law Claim For Breach Of Fiduciary Duty.

The Ninth Circuit held that ERISA fiduciaries can simultaneously owe fiduciary duties under both ERISA *and* state law in the same transaction and, indeed, even to the same

---

[4]Norcal and the Norcal ESOP also agree with Bank of America that the decision below merits review because, as explained in the Bank's separate petition, it conflicts with other Circuits' holdings regarding ERISA's preemption of state law claims challenging ESOP transactions exempted from ERISA's general prohibited transaction provisions.

ERISA-protected party. Plaintiffs thus can subject plan administrators' conduct to scrutiny for satisfaction *both* of ERISA fiduciary duties *and* of different or additional state law fiduciary duties. The Ninth Circuit's conclusion is incorrect (and, as we show in Section B below, contrary to decisions of five other Circuits).

A central purpose of ERISA's preemption clause and its civil enforcement provisions was to create uniform, exclusive federal standards of fiduciary responsibility for those who manage and direct the investments of employee retirement plans. *See supra* at pp.5–7 and authorities cited. ERISA requires fiduciaries to act with "an eye single" to beneficiaries' interests (*Pegram v. Herdrich*, 530 U.S. 211, 235 (2000) (quotation omitted)) and to discharge their duties "*solely* in the interest of the participants and beneficiaries," meaning "for the *exclusive* purpose of (i) providing benefits . . . and "(ii) defraying reasonable expenses." §404(a)(1), 29 U.S.C. §1104(a)(1) (emphases added).

But not all acts of a party who is for some purposes an ERISA fiduciary are fiduciary acts regulated by ERISA. As this Court recognized in *Pegram*, "[e]mployers, for example, can be ERISA fiduciaries and still take actions to the disadvantage of employee beneficiaries, when they act as employers (*e.g.*, firing a beneficiary for reasons unrelated to the ERISA plan), or even as plan sponsors (*e.g.*, modifying the terms of a plan [a nonfiduciary function] . . . to provide less generous benefits)." 530 U.S. at 225. Thus, ERISA allows a party to act as a fiduciary toward a plan's beneficiaries in some transactions and to act as a non-fiduciary, with divergent or even adverse interests, in others.

While recognizing that parties may perform *different acts* in different capacities, ERISA carefully avoids subjecting parties to different fiduciary duties under ERISA and under state law for the *same act*. It does so by requiring "that the fiduciary with two hats *wear only one at a time, and wear the fiduciary hat when making fiduciary decisions*." *Id.* (emphasis added). For any act of a fiduciary challenged in a

lawsuit, a court must determine whether that fiduciary was wearing its ERISA fiduciary hat or a different hat to which state law could apply; to do this, it must focus on the challenged act:

> In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but *whether that person was acting as a fiduciary* (that is, was performing a fiduciary function) *when taking the action subject to complaint.* (*Id.* at 226 (emphasis added))

The crucial point is this: what determines whether a claim affects a defendant in his or her capacity as an ERISA fiduciary is the nature of the challenged *act*, not whether the plaintiff *says* that it is suing the fiduciary in an ERISA capacity or in a state law capacity, and not whether plaintiff asserts its ERISA or state law rights (or, as here, *both*). If parties have an ERISA-regulated relationship, each *act* is either subject to ERISA fiduciary duties or to state law standards, but not both. If the act is subject to ERISA fiduciary duties, any otherwise relevant state law fiduciary duty is preempted; and a state law suit by a plan participant against an ERISA fiduciary challenging that act is completely preempted.[5] This is hornbook ERISA law. *See, e.g.*, Robert N.

---

[5]While preemption and complete preemption are distinct concepts, and the Ninth Circuit briefly discussed the latter (App. at 17a–20a), its holding in fact rests entirely on its flawed "dual capacity" analysis of preemption (*id.* at 11a–17a). The Ninth Circuit acknowledged that ERISA authorized the ESOP Participants to sue the ESOP fiduciaries for breach of their ERISA fiduciary duties (as the ESOP Participants had in fact done in their federal suit). *Id.* at 18a. Accordingly, if their purportedly state law–based claim for breach of fiduciary duty *did* in fact "relate to" the ESOP, then the ESOP Participants could have brought that claim under ERISA if it was within the scope of one of the civil-enforcement provisions of Section 502.

Defendants cited two provisions under which the ESOP Participants' purportedly state law–based claim should be recharacterized as arising under ERISA: Sections 502(a)(2) and (a)(3). The Ninth Circuit's one-sentence analysis of Section 502(a)(3) merely recapitulated its "dual

(continued . . .)

Eccles, "Fiduciary Litigation Under ERISA," in *ERISA Fiduciary Law* 400 (Susan P. Serota ed., 1995) ("Because ERISA exclusively supplies the standard by which fiduciary conduct is measured, any claims alleging a breach of fiduciary duty based on state law will be preempted").

In approving the ESOP mergers at issue, the ESOP Committee performed ERISA-regulated fiduciary acts. Indeed, in their federal court suit, the ESOP Participants themselves described those transactions as involving ERISA fiduciary acts. 1 ER 57 ¶19. That suit, like the state law breach of fiduciary duty claim, focused significantly on the Envirocal ESOP and Excel ESOP Mergers (*compare* 1 ER 1 ¶¶56–61 *with* 1 ER 57 ¶¶15–18)—a parallel recognized by the Ninth Circuit.[6] In those transactions, the ESOP

(. . . continued)
capacity" preemption analysis (*see* App. 19a ("none of these Plaintiffs seek[s] relief as a participant . . . ." (internal quotation omitted)) and thus fails. Accordingly, removal was proper because Section 502(a)(3) completely preempted the claim, making analysis of Section 502(a)(2) unnecessary.

In any case, the Ninth Circuit also erred in rejecting complete preemption under Section 502(a)(2), on the ground that Plaintiffs sought relief on their own behalf, not on behalf of the plan, as subdivision (a)(2) requires. *Id.* (The court made no such claim about subdivision (a)(3), which allows participants to seek relief on their own behalf. *See Varity Corp. v. Howe*, 516 U.S. 489, 507–15 (1996)). But plan participants cannot avoid recharacterization under Section 502(a)(2) simply by suing on their own behalf. When Congress required that participants bring Section 502(a)(2) claims on behalf of a *plan*, while preempting any state law claim that "relates to" a plan, it made clear its intent that participants not be able to recover individually on such claims *at all*, not that they be able to do so under state law. *Cf. Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1222–23 n.13 (9th Cir.), *amended by* 208 F.3d 1170 (9th Cir.), *cert. denied*, 531 U.S. 992 (2000) (unavailability under ERISA of specific relief sought does not preclude complete preemption); *Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1010 (9th Cir. 1998) (similar, preemption) (citing opinions of three Circuits).

[6] *Compare* App. 6a (describing "alleged conduct underlying Plaintiffs' [state law] claims" as "a series of breaches, misrepresentations, omissions, concealment, and conflicts of interest by Defendants . . . *in conjunction with . . . the 1987 Envirocal transaction, and subsequent ESOP activities*") *with id.* (describing ESOP Participants' federal claims as (continued . . .)

Committee members exercised their discretion under ERISA to manage and invest ESOP assets.[7] In discharging their ERISA-imposed fiduciary responsibilities, they were required to approve transactions that they found to be in the best interests of the ESOP and its participants. *See supra* at p.6. But under the Ninth Circuit's decision, those ERISA fiduciaries, having approved such transactions, may be liable for breach of a *state law* fiduciary duty requiring them to refrain from any action that is not also in the best interests of the ESOP's *creditors*.

This is a paradigmatic example of what Congress intended ERISA's preemption clause to prohibit. Whatever effect the 1974 Congress intended ERISA's broad "relate to" preemption clause to have on state laws regulating health care and similar services, at a minimum it intended to exclude the imposition of competing state law fiduciary duties on those responsible for the core ERISA function of making investment decisions regarding retirement plans' assets.[8] Even the narrow early versions of ERISA's pre-

---

(. . . continued)
based on a "breach of . . . duties imposed by ERISA *in conjunction with the 1987 Envirocal transaction and subsequent ESOP activities*") (all emphases added).

[7]The Ninth Circuit asserted that the state law claims "did not arise from transactions directly relating to plan benefits or administration." App. 16a. While the state law claims did not directly seek recovery of "plan benefits," the court recognized earlier in its opinion that the challenged conduct included the ESOP Committee's decisions in managing and investing the ESOP's assets, including the decision to enter into "the 1987 Envirocal transaction, and subsequent ESOP activities." *Id.* at 6a. ERISA standards indisputably governed that conduct. *See* 29 C.F.R. §2509.94–2(1) (1994) (discussing "fiduciary act of managing plan assets that are shares of corporate stock"); *Martin v. Feilen*, 965 F.2d 660, 667 (8th Cir. 1992) (ERISA may require ESOP fiduciary to act for ESOP-as-shareholder).

[8]*See, e.g.*, H.R. COMM. ON EDUCATION & LABOR, H.R. REP. No. 93–533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655 (focusing analysis of enforcement and preemption on "essential" need to "provide for *a uniform source of law*" in five areas, including "evaluation of fiduciary conduct" (emphasis added)); *id.* (listing, as among ERISA's primary purposes, "to establish minimum standards of fiduciary conduct for

(continued . . .)

emption clause barred state regulation of fiduciary conduct, showing that a central goal of ERISA from the start was to make federal regulation of fiduciary responsibility exclusive.[9]

In the opinion below, the Ninth Circuit rejected its prior preemption analysis in *General American Life Insurance Co. v. Castonguay*, 984 F.2d 1518 (9th Cir. 1993)), believing that this Court's opinion in *Travelers* had "'markedly narrowed'" the scope of ERISA preemption (App. at 10a) (quoting *Toumajian v. Frailey*, 135 F.3d 648, 653–54 n.3 (9th Cir. 1998)) and required the court to narrow or reject what it described as *Castonguay*'s "broad language of undivided loyalties." App. at 16a. But the court misread *Travelers*, and *Castonguay*'s analysis continues to be sound.

Travelers narrowed only the periphery of ERISA preemption, addressing state laws that "relate to" ERISA plans not by imposing fiduciary duties on parties in ERISA relationships but by the indirect economic effect of changing the relative costs of services for which plans must pay. *See* 514 U.S. at 658–62.[10] Neither *Travelers* nor any later opinion of this Court addressed "the areas with which ERISA is

---

(. . . continued)
Trustees, Administrators, and others dealing with retirement plans, to provide for their enforcement . . ."); H.R. CONF. REP. No. 93–1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5106–07 (describing agreement to give federal courts "*exclusive* jurisdiction [of] actions involving breach of fiduciary responsibility" (emphasis added)).

[9]For example, the bill that passed the House, as this Court explained, "provided that ERISA would supersede state laws 'relat[ing] to . . . [*inter alia*] fiduciary responsibilities, of persons acting on behalf of any [regulated] employee benefit plan . . . .'" *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 n.18 (1983) (quoting H.R. 2, 93d Cong., 2d Sess., §514(a) (1974), *reprinted in* 3 Legislative History of the Employee Retirement Income Security Act of 1974, at 4057–58 (1976)). The Conference Committee rejected such narrow provisions in favor of the broad "relates to" language ultimately enacted. *See id.* at 98.

[10]This Court's two later opinions finding no preemption also involve indirect economic effects. *See DeBuono v. NYSA-ILA Med. & Clin. Servs. Fund*, 520 U.S. 806, 814–16 (1997); *Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 324–34 (1997).

expressly concerned—'reporting, disclosure, *fiduciary responsibility*, and the like'" (*Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 330 (1987) (emphasis added)), or narrowed the category of state law claims that can be recharacterized as arising under ERISA's civil enforcement scheme and thus completely preempted. *Travelers* thus has no bearing on the core ERISA issues that the Ninth Circuit addressed here and provides no reason to reject *Castonguay*'s preemption analysis.

Castonguay, a well-reasoned opinion by Judge Kozinski, addressed a California law that imposes personal liability on trustees for a trust's breach of certain contracts, holding that ERISA preempts the law as applied to ERISA fiduciaries with regard to a plan's breach of contract. 984 F.2d at 1521–22. The court held that a claim under that law, brought by a creditor of the plan against its trustees, "encroaches on the relationships regulated by ERISA," and thus is preempted, because it "subjects trustees to personal liability on account of things they do in discharging their responsibility to the trust." *Id.* at 1522. Such a threat of personal state law liability would alter the trustees' discharge of their ERISA duties "just as surely as direct regulation," the court stressed, because "a trustee exposed to additional personal liability for his acts as trustee may act much more timidly" (*id.*) and be "seriously distract[ed] . . . from his duties." *Id.* at 1523. For example, "when a trust is skating close to the financial edge," as was the case in *Castonguay*, "the trustees' fear of personal liability may keep them from doing what's necessary to get the trust on its feet again." *Id.* That fear would undermine "[o]ne of the key principles underlying ERISA," *i.e.*, that fiduciaries "must be devoted *solely* to the interest of plan beneficiaries." *Id.* Applying that principle, the court held that plan fiduciaries must be free, in the exercise of their discretion, to decide that it is in the best interests of the plan and its beneficiaries to breach a contract, notwithstanding the interests of the plan's creditors. *Id.* at 1523 & n.7.

The principles recognized in *Castonguay* apply here with even greater force. In this case, Plaintiffs' theory is that state law *prohibited* the plan administrators from approving ESOP mergers even if those administrators, in the exercise of their ERISA-regulated fiduciary judgment, found the transactions to be in the best interests of the ESOP's participants. Because the ESOP Committee members wore their ERISA-fiduciary hats in the challenged transactions—as they were required to do—they cannot also have been wearing their state law "manager of the debtor on the ESOP Notes" hat, and state law cannot impose fiduciary duties on their approval of those transactions.

B. The Ninth And Fifth Circuits' Preemption Holdings Conflict With Those Of Five Other Circuits.

As explained above, the Ninth Circuit imposed an improperly narrow test for preemption that allows ERISA and state law fiduciary duties to govern the same acts of managing and directing the investments of a plan. *See supra* at pp. 13–18. The Fifth Circuit opinion on which the court relied (*Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1468 (5th Cir. 1986)) took a similar approach. *See id.* These decisions conflict with holdings in five other Circuits.[11]

---

[11]Because the panel's rulings on ERISA preemption and complete preemption rest on the same rationale (*see supra* at n.5), this Petition addresses without further distinction the opinions of the five conflicting Circuits, whether they concern complete preemption (as do four) or only preemption (as does one). *Compare Hull v. Fallon*, 188 F.3d 939, 942–43 (8th Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000); *Smith v. Provident Bank*, 170 F.3d 609, 613 (6th Cir. 1999); *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1487–88 (7th Cir. 1996); *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 10 (2nd Cir. 1992) (all finding complete preemption and, expressly or implicitly, preemption); *with Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1185 (3rd Cir. 1996) (addressing only preemption). Likewise, in discussing those opinions, we refer for simplicity's sake to

(continued . . .)

1. In The Sixth And Third Circuits, ERISA Preempts Any State Law Claim Concerning An ERISA Plan Between Parties In An ERISA-Regulated Relationship.

The Sixth Circuit has squarely held that ERISA preempts any state law claim where a plan, participant or fiduciary is a party and the claim concerns a fiduciary or other duty of care regarding management of plan assets. *Smith v. Provident Bank*, 170 F.3d 609, 613–17 (6th Cir. 1999). Under *Smith*, when ERISA regulates a plan, it occupies the field of duties of care regarding the plan—fiduciary or other—and leaves no room for state law duties between parties thereto.

Plaintiffs in *Smith*, an ERISA plan participant and his ERISA plans, sued an array of individuals and entities for removing assets from the plan participant's ERISA plan investment accounts. As in this case, plaintiffs sued both in federal court under ERISA and in state court for common law breach of fiduciary duty, negligence and the like. The defendants removed the state court action. Unlike the Ninth Circuit here, the Sixth Circuit found preemption and *affirmed* the District Court's exercise of jurisdiction.

The Sixth Circuit held that ERISA preempted almost all of plaintiffs' state law claims, including those for breach of fiduciary duty. *Id.* at 612–17. Of special significance, the court so held *even assuming* that the lead defendant had ceased being an ERISA fiduciary by the time it removed the plan assets. That is, the court rejected the plan participant's theory that if the defendant was no longer an ERISA fiduciary at the time of the misconduct, its actions with respect to the participant's ERISA accounts could be judged by some other (allegedly greater) state law duty. *Id.* at 613. As the court explained, a state law fiduciary duty applicable to the

---

(. . . continued)
"preemption" whether the case involved preemption only or complete preemption.

administration of ERISA plan assets *simply cannot coexist with ERISA*:

> [I]t is the nature of the claim—breach of fiduciary duty—that determines whether ERISA applies, not whether the claim will succeed. In enacting ERISA and broadly preempting state law, Congress intended to standardize the administration of employee benefit plans, including the duties and liabilities of fiduciaries. It is not a valid argument against preemption to say that the state seeks to impose greater obligations than Congress did. (*Id.*)

The Sixth Circuit's understanding of the broad scope of ERISA preemption of state law breach of fiduciary duty claims is demonstrated even more clearly by its analysis of the claims against two defendants who were involved with the disputed assets but may not ever have been "fiduciaries" under ERISA. ERISA preempted the state law claims against them for breach of fiduciary duty, the Sixth Circuit held, whether or not they qualified as ERISA fiduciaries (and thus would be subject to liability under ERISA). *Id.* The court flatly rejected the notion that anyone—ERISA fiduciary or not—could be subject to state law breach of fiduciary duty claims with respect to the management of an ERISA plan. ERISA imposes the *only* fiduciary duties regulating management of plan assets, preempting any state law duty, so that if a party is not liable under ERISA, it cannot be liable at all, even under state law: "if [the two defendants] do not meet ERISA's definition of a fiduciary, neither can be liable for breach of fiduciary duty with respect to management of an ERISA plan." *Id.*

The Third Circuit is in accord, having made clear that if a party is an ERISA fiduciary, ERISA occupies the field of duties between it and a plan, preempting otherwise valid claims for breach of state law fiduciary duties regarding management of plan assets. *See Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1185 (3rd Cir. 1996) (remanding for determination whether defendant brokerage firm qualified as ERISA

fiduciary, in which case ERISA would preempt any claim based on state law fiduciary relationship of stockbroker and client).

The conflict with the Ninth Circuit is striking. In the Sixth Circuit, ERISA's fiduciary provisions completely preempt the field, including all duties of loyalty or care that touch on an ERISA plan and involve *either* a participant *or* a fiduciary. (The ESOP Participants' claims in this case involve *both*.) In the Third Circuit, a party's ERISA-fiduciary status absolutely precludes the imposition of state law fiduciary duties with respect to acts involving the administration of plan assets. In these Circuits, no state law claim for breach of fiduciary duty can supplement or modify ERISA's specific set of duties, remedies and authorized suits. In the Ninth Circuit, by contrast, a plan participant now may pursue claims for breach of state law fiduciary duties against even a *current* ERISA fiduciary. That is, two parties can simultaneously have ERISA- and state law–governed relationships involving the same acts relating to the same ERISA plan. This threatens exactly the sort of conflicting duties under state and federal law that it is the central purpose of ERISA's preemption clause to avoid. *See, e.g.*, *Travelers*, 514 U.S. at 656–57.

2. The Second Circuit Has Rejected The "Dual Capacity" Analysis Used By The Ninth Circuit, Holding That ERISA Preempts Claims Based On Contractual Relationships Existing Before The ERISA Relationship.

The Second Circuit also has rejected the "dual capacity" analysis employed by the Ninth Circuit in the opinion below. In *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992), the plaintiff had agreed to transfer jobs from his British employer to its American affiliate in reliance on a promise that the affiliate would pay him retirement benefits, separate from those due under its ERISA plan, that would be com-

mensurate with those he would have received in England. 959 F.2d at 7. When the company reneged, the employee sued in state court for, *inter alia*, breach of contract. *Id.* The company removed. On appeal, the Second Circuit held that ERISA preempted the suit, despite the plaintiff's insistence that he had sued the company "*only in its capacity as an employer*, not as an administrator of the ERISA plan." *Id.* at 8, 10–11 (emphasis added).

As the Second Circuit acknowledged, the plaintiff argued "attractively" that he in no way contested his benefits due under the ERISA plan but sought only to enforce an antecedent promise to pay additional benefits assertedly unconnected to the plan. *Id.* at 12. Moreover, the company had made the promise based on the employee's prior relationship with the British employer *before* he became a participant in the American affiliate's ERISA plan. *Id.* at 7. Nonetheless, the Second Circuit rejected plaintiff's argument: once the plaintiff joined the plan, his remedies were limited to those under ERISA.

3. The Seventh And Eighth Circuits Have Held Preempted State Law Claims By ERISA Plan Participants Against Plan Administrators Based On Assertedly Parallel State Law Relationships.

Two other Circuits have rejected arguments against preemption that, while a defendant's acts were part of an ERISA relationship as health plan administrator, they were also part of a state law medical relationship imposing parallel duties of care. *See Hull v. Fallon*, 188 F.3d 939 (8th Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000); *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482 (7th Cir. 1996).[12] Each

---

[12]The Seventh Circuit also agrees with the Second Circuit that ERISA preempts state law claims arising from contractual relationships existing prior to the ERISA relationship. *See Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1076 (7th Cir. 1992) (Easterbrook, J.) (rejecting (continued . . .)

case involved a negligence or malpractice claim against a doctor or nurse who, while working as a health plan administrator, declined to authorize a treatment. *See Hull*, 188 F.3d at 941; *Jass*, 88 F.3d at 1484–86. Each plaintiff argued that the act entailed medical advice or treatment, so that plaintiff's claim was based on a state law caregiver-patient relationship. *See Hull*, 188 F.3d at 942; *Jass*, 88 F.3d at 1488–89.

The Eighth Circuit conceded that the doctor in *Hull* had "necessarily exercise[d] medical judgment" in his act of evaluating plaintiff's need for a proposed treatment—conduct that plainly involves core features of a doctor-patient relationship subject to state law duties of care. 188 F.3d at 943. Nonetheless, the Eighth Circuit looked instead to the parties' ERISA-regulated relationship and held that "the essence of [plaintiff's] claim rests on the denial of benefits" and that ERISA thus preempted any claim based on the plausibly distinct state law relationship. *Id.* at 943. The Seventh Circuit, emphasizing that the plaintiff in *Jass* (like the ESOP Participants here) had filed a separate ERISA complaint against the nurse, held that the plaintiff could not "avoid 'complete preemption' by deceptively alleging that [the defendant] 'voluntarily assumed duties' . . . identical to her duties as a utilization review administrator for [the plan]." 88 F.3d at 1489. These decisions also conflict with the Ninth Circuit's new "dual capacity" analysis.

(. . . continued)
plaintiff's characterization of claim for additional pension payments as claim to enforce preexisting contract under state law).

C. The Ninth Circuit's Opinion Undermines A Core Purpose Of ERISA By Making Unclear The Duties And Potential Liability Of Those Who Manage The Assets Of Hundreds of Thousands Of Pension Plans.

The conflict created by the Ninth (and Fifth) Circuit renders unclear the legal duties not only of fiduciaries of America's 11,500 or more ESOPs (which in 1999 received over $20 billion in contributions and held roughly $500 billion in stock),[13] but of *all* its private pension plans, which number over 700,000, have over 70 million participants and control assets exceeding $4 trillion.[14] Many such plans, of course, operate in numerous states, compounding the confusion and conflicting duties created by the decision below.

Such confusion undermines a core purpose of ERISA, through which Congress sought to create uniform federal standards to guide fiduciaries and to vest federal courts with exclusive jurisdiction over actions for breach of their fiduciary duties. *See* §§401–414, 29 U.S.C. §§1101–1114 (fiduciary standards); §502(e)(1), 29 U.S.C. §1132(e)(1) (exclusive jurisdiction). Congress plainly intended ERISA's preemption clause to displace state laws that impose fiduciary duties on ERISA fiduciaries with regard to their conduct in managing or administering plans. *See supra* at pp.16–17 & nn.8–9.

The Ninth Circuit has imperiled that core purpose of ERISA because it misread this Court's recent decisions

---

[13] Http://www.the-esop-emplowner.org/pubs/stats.html (visited Feb. 8, 2002).

[14] U.S. Dep't of Labor, Pension & Welfare Benefits Admin. [PWBA], *Private Pension Plan Bulletin—Abstract of 1997 Form 5500 Annual Reports*, No. 10 (Winter 2001), *currently available at* http://www.dol.gov/dol/pwba/public/programs/opr/bullet97/cover.htm; U.S. Dep't of Labor, PWBA, *Fact Sheet—Changes in the Private Employment Based Pension and Health Systems Over the Past 25 Years* (Sept. 1999), *currently available at* http://www.dol.gov/dol/pwba/public/pubs/factsht2.htm.

about a different topic: the difficulty of defining the *outer limits* of ERISA preemption. *See supra* at pp.17–18 (discussing Ninth Circuit's erroneous view that *Travelers'* "narrowing" of ERISA preemption dictated new Ninth Circuit "dual capacity" analysis). By misguidedly applying *Travelers* to the core of ERISA preemption (and complete preemption), the Ninth Circuit has exposed ERISA fiduciaries in nine states to conflicting duties and personal liability under state law for their ERISA-regulated acts in managing pension plan assets. The Fifth Circuit opinion on which it relied poses the same threat in three more states. A decision by this Court is necessary to confirm the exclusivity of ERISA's uniform fiduciary standards in the core area of plan asset management, and thus to reassure plan administrators that ERISA provides the sole measure of their fiduciary duties and potential liability.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully,

JEROME B. FALK, JR.
Counsel of Record
BARBARA A. WINTERS
DOUGLAS A. WINTHROP
KEITH KESSLER
HOWARD, RICE, NEMEROVSKI, CANADY, FALK & RABKIN
A Professional Corporation

PAUL J. ONDRASIK, JR.
STEPTOE & JOHNSON, LLP

Counsel for Petitioner Norcal Waste Systems, Inc.

DEBORAH S. BALLATI
KAREN P. KIMMEY
FARELLA, BRAUN & MARTEL

Counsel for Petitioner Norcal Waste Systems, Inc. Employee Stock Ownership Plan and Trust

February 2002

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-17132, 99-17040 and 99-17474

[Filed September 7, 2001]

JULIO ABRAHAM, *et al.*,
Plaintiffs-Appellants,
v.
NORCAL WASTE SYSTEMS INC, *et al.*,
Defendants,
and
BANK OF AMERICA,
as successor to Security Pacific National Bank,
the Indenture Trustee,
Defendant-Appellee.

JULIO ABRAHAM, *et al.*,
Plaintiffs-Appellees,
v.
NORCAL WASTE SYSTEMS INC, *et al.*,
Defendants-Appellees,
THE BANK OF AMERICA,
Defendant-Appellant,
and
CHASE MANHATTAN BANK, N.A.,
BANK OF CALIFORNIA,
CALIFORNIA FEDERAL BANK,
Defendants.

BANK OF AMERICA NT & SA,
as successor in interest by merger with
Security Pacific National Bank, Indenture Trustee,

Plaintiff-Appellant,

v.

NORCAL SOLID WASTE SYSTEMS EMPLOYEE
STOCK OWNERSHIP PLAN AND TRUST,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California

D.C. Nos. CV 94-3076 CAL, 99-1175 CAL

(September 7, 2001)

Before THOMPSON, O'SCANNLAIN, and TASHIMA, Circuit Judges.

TASHIMA, Circuit Judge:

These consolidated appeals arise out of a complex background of financial transactions and litigation stemming from the leveraged buyout of company stock by an employee stock ownership plan. Plaintiffs in the earlier of the two actions (No. 99-17040 and No. 99-17474) ("Plaintiffs") originally brought suit in California state court, alleging only state law causes of action in their complaint. Defendants successfully removed the case to federal district court on the basis of complete preemption, pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* The parties raise numerous issues on appeal from the ensuing litigation. Because we conclude that the

district court lacked original subject matter jurisdiction, necessary for removal pursuant to 28 U.S.C. § 1441, we must vacate the judgments below. We have jurisdiction to entertain this appeal from the district court's final judgment, 28 U.S.C. § 1291, and to decide the jurisdictional issue, *Toumajian v. Frailey*, 135 F.3d 648, 652-53 (9th Cir. 1998).

I. BACKGROUND

a. Facts

Norcal Solid Waste Systems, Inc. ("Norcal"), a California corporation, was an employee-owned garbage company. Plaintiffs are former employee-shareholders (or their heirs and assigns) of Norcal. Norcal created the Norcal Solid Waste Systems, Inc., Employee Stock Ownership Plan and Trust (the "Norcal ESOP" or "ESOP") to purchase shares from Plaintiffs in a leveraged buyout of company stock. There is no dispute that the ESOP is an employee benefit plan within the meaning of ERISA. In December 1986, Plaintiffs sold their stock to the ESOP as part of the leveraged buyout transaction for $65 million in cash and $36.5 million in long-term notes. Forty-four of the Plaintiffs also were Norcal employees and participants in the benefit plan ("ESOP participants").

The 1986 leveraged buyout was accomplished through a complex financing arrangement in which the ESOP's acquisition of Norcal's shares was financed by bank loans to Norcal, which in turn then lent those funds to the ESOP. Bank of America (the "Bank") served as a senior lender (among several banks) and a financial advisor to Norcal for the leveraged buyout. The long-term notes that were issued to the former shareholders pursuant to the buyout were governed by the terms of a trust indenture agreement (the "Indenture") between the Norcal ESOP, as obligor, and Security Pacific National Bank, as the trustee ("Security Pacific" or the "Trustee"). Security Pacific also acted as a lender to Norcal in the 1986 transaction.

The notes were non-recourse as against Norcal, were not secured by Norcal stock, were subordinated to the Norcal ESOP's senior indebtedness (*i.e.* the bank loans to Norcal that were subsequently lent to the ESOP), and were to be paid in accordance with ERISA regulations for exempt transactions. Among the other provisions of the Indenture relevant to the litigation were the following:

> Section 8.01(b): "In case an Event or Default has occurred and is continuing, the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the conduct of his or her own affairs."
>
> Section 8.07(3): "[The Plan agrees] to indemnify the Trustee for, and to hold it harmless against, any loss, liability or expense incurred without negligence or bad faith on its part, arising out of or in connection with the acceptance or administration of this trust, including the costs and expenses of defending itself against any claim or liability in connection with the exercise or performance of any of its powers or duties hereunder."
>
> Section 10-2: "The Plan shall not consolidate with or merge into any entity or convey, lease or transfer its properties and assets substantially as an entirety to any Person unless the Plan shall first redeem the entire Outstanding principal of all of the Notes."

The Indenture also provided that "it shall be construed in accordance with and governed by the laws of the State of California."

In December 1987, Norcal consummated a transaction with Envirocal, Inc. ("Envirocal"), whereby the Norcal ESOP and the Envirocal ESOP (simultaneously with their respective sponsors) combined to form a single entity.[1] The former owners of Envirocal exchanged stock for a combination of cash and notes. Security Pacific also acted as a lender to Norcal in the 1987 Envirocal transaction. On May 15, 1988, in its capacity as the Trustee, Security Pacific sent an annual reporting letter to Plaintiff note holders stating, among other things, that "[n]o other action has been taken by the Trustee, in the performance of its duties under the Indenture, which, in its opinion, materially affect the Noteholders." Only in September 1988 did the ESOP advise its participants (44 of whom are among Plaintiff note holders) of the 1987 Envirocal transaction.

Between 1986 and April 1991, the Norcal ESOP paid each quarterly interest payment due on the notes, and the Trustee also transferred all of these payments to Plaintiff note holders, as required by the Indenture. In April of 1991, however, Norcal defaulted on its indebtedness to the bank lenders and to the Envirocal note holders, and the ESOP defaulted on its indebtedness to Plaintiff note holders. On March 7, 1991, Security Pacific sent letters to Norcal and the ESOP resigning as Trustee under the Indenture (as well as under the subsequent indenture formed for the Envirocal note holders, for which it also served as trustee), and on May 14, 1991 a successor trustee was formally substituted.

b. Proceedings

Plaintiffs commenced an action in California state court in 1994 against the Trustee, Norcal, the ESOP, Norcal's bank lenders, and several individual officers and directors of the

---

[1] The parties disagree on the structure of the transaction for purposes of Section 10-2 of the Indenture.

defendant corporations (including some members of the ESOP Administrative Committee). The Bank was sued not only in its capacity as a lender in the 1986 leveraged buyout, but also as successor in interest to Security Pacific, which was both a lender and the Trustee.[2] Plaintiffs alleged state law causes of action including fraud, breach of contract, tortious interference with contract, negligence, breach of fiduciary duty, and unjust enrichment.

The alleged conduct underlying Plaintiffs' claims was a series of breaches, misrepresentations, omissions, concealment, and conflicts of interest by Defendants, as well as an alleged conspiracy among them, in conjunction with the initial leveraged buyout, the 1987 Envirocal transaction, and subsequent ESOP activities. These acts allegedly resulted in Plaintiffs' unwitting reliance in tendering their shares in Norcal for restricted notes, the failure to redeem or enforce redemption of those notes at the time of the Envirocal transaction, and the eventual default on those notes. Forty-four of the Plaintiffs, who were also ESOP participants, simultaneously initiated a separate action in federal district court against Norcal, the Norcal ESOP, and some individual defendants for the breach of their duties imposed by ERISA in conjunction with the 1987 Envirocal transaction and subsequent ESOP activities.

Defendants removed the action from state court to federal court on the basis of complete ERISA preemption. The district court denied Plaintiffs' motion to remand, concluding that, at least with respect to the subset of 44 Plaintiffs who were ESOP participants, the state law causes of action based on constructive fraud, fiduciary duty, and negligence were preempted by ERISA. The district court then asserted

---

[2] The Bank succeeded to the interest of Security Pacific as the result of the merger of Security Pacific into the Bank.

supplemental jurisdiction over the remaining claims and parties. *See* 28 U.S.C. § 1367(a). On motion for partial summary judgment by Plaintiffs, the district court ruled on June 30, 1995, that the 1987 Envirocal transaction constituted a triggering event for purposes of redemption under Section 10-2 of the Indenture and that the ESOP had defaulted under the terms of that provision. In August 1995, Norcal and the ESOP completed a settlement with Plaintiffs for the principal due on the notes, but not the interest (the "Settlement"). Under the Settlement, Plaintiffs agreed to a broad release of all claims against all parties, excepting only their preservation of the claims against the Trustee falling outside the scope of the ESOP's contractual indemnity obligations to the Trustee pursuant to Section 8.07(3) of the Indenture. The district court subsequently entered orders determining the Settlement to be in good faith and dismissing the released claims and parties.

In February 1996, Plaintiffs filed a second amended complaint against the Bank of America alone. Prior to trial, Norcal and the ESOP intervened to obtain a declaration that they had no further indemnity obligations to the Bank under the Indenture after the Settlement. On December 17, 1996, the district court granted summary judgment in favor of Norcal and the ESOP on their complaint in intervention for declaratory relief. After trial on the remaining claims, judgment on the jury verdict was entered in favor of the Bank.[3] The district court denied Plaintiffs' motion for a new trial and entered final judgment on October 22, 1999. Plaintiffs timely appeal, and the Bank timely cross-appeals (No. 99-17040 and No. 99-17474).

---

[3] The details of the verdict are immaterial to our analysis and disposition.

After the verdict, the Bank commenced a separate action in federal court against the ESOP seeking a declaration of its entitlement to indemnity under the Indenture for its post-Settlement defense costs in light of the specific findings of the special verdict. On cross-motions for summary judgment, the district court again ruled in favor of the ESOP on the indemnity issue. Final judgment in that action was entered on August 25, 1999. The Bank timely appeals (No. 99-17132).

II. JURISDICTION

Plaintiffs contend that the district court lacked subject matter jurisdiction at the time the case was removed and at the time of judgment; therefore, the denial of the motion to remand was error and the proceedings and judgment must be vacated.[4] The Bank, Norcal, and the ESOP contend that Plaintiffs' claims for constructive fraud, breach of fiduciary duty, and negligence in the state court complaint (at least with respect to the 44 Plaintiffs who are also ESOP participants) are subject to complete preemption under ERISA, providing the court with subject matter jurisdiction and a federal question to anchor removal of the entire action.[5]

---

[4] None of the parties contends, nor is it the case, that any alleged jurisdictional defect on removal may have been corrected by the time of final judgment on the merits, either via diversity or otherwise. *Cf. Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702-704, 92 S. Ct. 1344, 31 L.Ed.2d 612 (1972) (whether or not case is properly removed, if court proceeds to judgment on merits without objections, issue is whether district court would have had original jurisdiction if case had been filed in a federal court, measured at time of judgment). Thus the only relevant question is whether subject matter jurisdiction existed at the time of removal.

[5] For the purposes of this analysis, the original complaint is the operative pleading because that is the basis upon which removal was granted and Plaintiffs' motion to remand was denied. *See Toumajian*, 135 F.3d at 653 n. 2.

Questions of subject matter jurisdiction and removal are reviewed de novo. *Toumajian*, 135 F.3d at 652. The denial of a motion to remand a removed case by the district court is also reviewed de novo. *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health and Envtl. Quality*, 213 F.3d 1108, 1111 (9th Cir. 2000).

Removal under 28 U.S.C. § 1441 requires that the complaint contain a claim within the original subject matter jurisdiction of the federal district court. *Toumajian*, 135 F.3d at 653. Thus, only if we can discern a federal question was removal proper.

Plaintiffs' complaint did not facially assert any federal claim; therefore, the original subject matter jurisdiction required to support removal exists only if ERISA completely preempted any of the state law claims. *See Rutledge v. Seyfarth, Shaw, Fairweather, & Geraldson*, 201 F.3d 1212, 1215 (9th Cir.), *amended by* 208 F.3d 1170 (9th Cir.), *cert. denied*, 531 U.S. 992, 121 S. Ct. 482, 148 L.Ed.2d 456 (2000). The doctrine of complete preemption has been described as "an independent corollary to the well-pleaded complaint rule". *Id.* (quoting *Harris v. Provident Life and Accident Ins. Co.*, 26 F.3d 930, 934 (9th Cir. 1994)). Complete preemption can be invoked only when two conditions are satisfied: (1) ERISA expressly preempts the state law cause of action under 29 U.S.C. § 1144(a) (*i.e.* "conflict preemption") and (2) that cause of action is encompassed by the scope of the civil enforcement provision of ERISA, 29 U.S.C. § 1132(a) (*i.e.* "displacement"). *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 60, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987); *Rutledge*, 201 F.3d at 1216. Neither of these conditions was satisfied in this case.

a. Conflict Preemption under 29 U.S.C. § 1144(a)

Section 1144(a) states, in relevant part, that "provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or

hereafter relate to any employee benefit plan. . . ." The critical phrase "relate to" has been the source of much confusion as well as multiple and slightly differing analyses by this court. *See, e.g., Rutledge*, 201 F.3d at 1216-19 (surveying our approach to the "relates to" requirement but ultimately declining to develop a test "describing the outer bounds of ERISA [conflict] preemption"). We recognize that while this "relate to" language has been construed quite broadly in the past, the Supreme Court has narrowed the applicability of § 1144(a) in recent years ever since its decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S. Ct. 1671, 131 L.Ed.2d 695 (1995). *See also Toumajian*, 135 F.3d at 654 n.3 (acknowledging that "[r]ecently, the scope of this broad 'relate to' preemption was markedly narrowed" (quoting *Travelers*, 514 U.S. at 655, 115 S. Ct. 1671)).

State law "relates to" an ERISA benefit plan if there is a "connection with" or "reference to" such a plan. *Blue Cross v. Anesthesia Care Assocs. Med. Group, Inc.*, 187 F.3d 1045, 1052 (9th Cir. 1999) (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324, 117 S. Ct. 832, 136 L.Ed.2d 791 (1997)). As we discussed in *Rutledge*, the "reference to" prong of the test is fairly precise and did not apply there–nor is it applicable here–because the state law in question did not act "immediately and exclusively" upon an ERISA plan nor is such a plan "essential" to the operation of the law. 201 F.3d at 1216 (quoting *Dillingham*, 519 U.S. at 325, 117 S. Ct. 832). Plaintiffs' allegedly preempted claims here were solely based on state law theories of constructive fraud, breach of fiduciary duty, and negligence, so the relevant state law certainly does not act immediately and exclusively on an ERISA plan, nor is such a plan essential to the operation of the law. In order "to determine whether a state law has the forbidden connection, we look both to the objectives of the ERISA statute as a guide to the scope of the state law that

Congress understood to survive, as well as to the nature and effect of the state law on ERISA plans." *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S. Ct. 1322, 1327, 149 L.Ed.2d 264 (2001) (internal quotation marks omitted). The only argument advanced for removal, and upon which the district court relied, is that the state law claims have the necessary "connection with" an ERISA plan because they encroach upon ERISA-regulated relationships.[6]

We have previously recognized that "a core factor leading to the conclusion that a state law claim is preempted is that the claim bears on an ERISA-regulated relationship." *Rutledge*, 201 F.3d at 1219. Under the rationale of a "relationship" test, "we look to whether the state law encroaches on relationships regulated by ERISA, such as between plan and plan member, plan and employer, and plan and trustee." *Blue Cross*, 187 F.3d at 1053. Those regulated relationships that are purported to be encroached upon in this case are between: (i) plan and "parties in interest," as

---

[6] The parties do not suggest, and we do not believe there to be, any reason that the state law claims at issue here may fall within the three traditional areas of preemption identified in *Travelers* and incorporated into the analysis of this court in *Arizona State Carpenters Pension Trust Fund v. Citibank*, 125 F.3d 715, 723 (9th Cir. 1997), namely state laws that: (1) mandate employee benefit structures or their administration; (2) bind employers or plan administrators to particular choices or preclude uniform administrative practice; and (3) provide alternative enforcement mechanisms to obtain ERISA plan benefits. Nor do we find that jurisdiction could be supported by preemption under any of the myriad "different, though compatible, tests" formulated by this court in our elusive quest "to follow the Supreme Court in fulfilling the statutory mandate of broad preemption without intruding upon state laws beyond the intention of Congress and the objectives of ERISA." *Rutledge*, 201 F.3d at 1217. Even were we to "eschew[ ] such multi-factor tests in favor of a more holistic analysis guided by Congressional intent," our analysis would be no different. *Dishman v. UNUM Life Ins. Co. of Am.*, 250 F.3d 1272, 1278 n.15 (9th Cir. 2001). The only asserted basis for preemption here is an intrusion upon ERISA-regulated relationships.

defined in 29 U.S.C. § 1002(14); (ii) plan and participants; and (iii) plan and fiduciaries. We find none of these arguments persuasive.

With respect to the first relationship, the Bank, Norcal, and the ESOP each suggests that ERISA comprehensively governed the sale of stock and extension of credit between a plan and "parties in interest," such as the employees of the plan sponsor; and that absent the express statutory exemptions provided by ERISA, any transaction constituting a "lending of money or other extension of credit between the plan and a party in interest" would have been a prohibited transaction. *See* 29 U.S.C. § 1106(a)(1)(B); *see also id.* § 1108(b)(3) (exempting loan when "primarily for the benefit of participants and beneficiaries of the plan" and "at an interest rate which is not in excess of a reasonable rate") *and* § 1108(e) (exempting acquisition by a plan of qualifying employer securities if "for adequate consideration" and "no commission is charged"). Certainly that subset of Plaintiffs who were current Norcal employees would be "parties in interest" for the purposes of the prohibited transaction provision. *See id.* § 1002(14)(A). But the state law claims alleged in the initial complaint did not implicate the prohibited transaction provision, which "serves ERISA's purposes by protecting a plan's participants and beneficiaries from a depletion of plan assets through shady, inside deals." *Rutledge*, 201 F.3d at 1222. Indeed, the claims do not remotely concern the objectives of ERISA.

Like all Plaintiffs, the employees were suing as note holders for state law fraud, breach of fiduciary duty, and negligence arising from a transaction that was expressly exempted from the prohibited transaction provision; their status as "parties in interest" is irrelevant. Unlike in *Rutledge*, where the preempted claims were premised on a relationship between a plan and a legal service provider in the very respects governed by ERISA's regulation of prohibited transactions, the state law claims here do not bear

upon any ERISA-governed relationship between a plan and "parties in interest." *See id.* ("Because the allegation at issue in the state law claims . . . is precisely the sort of prohibited transaction governed by ERISA, we hold . . . that the claims are preempted."). By carefully crafting exceptions to the transactions prohibited under ERISA and the conditions for those exceptions, Congress presumably understood the scope of the state law that would otherwise survive to govern such transactions in all aspects unrelated to the objectives and administration of ERISA. In this way, the ESOP's relationship with Plaintiffs who were also Norcal employees was no different from its relationship with the rest of the Plaintiff note holders. *Cf. Arizona State Carpenters*, 125 F.3d at 724 ("As a service provider offering nonfiduciary custodial services, Citibank's relationship with the Trust Funds was no different from that between Citibank and any of its customers."). Accordingly, we conclude that "[i]n the circumstances of this case, the connection between the state common law principles and ERISA's regulation of employee benefit plans is simply too tenuous, remote or peripheral to trigger preemption." *Id.* (internal quotation marks and citation omitted).

Nor, under similar reasoning, is a relationship between plan and participant encroached upon here. Those Plaintiffs who were also ESOP participants have an independent creditor relationship with the ESOP as a corporate entity based upon their status as former shareholders and current note holders under the Indenture. *See Gen. Am. Life Ins. Co. v. Castonguay*, 984 F.2d 1518, 1521-22 (9th Cir. 1993) ("But ERISA doesn't purport to regulate those relationships where a plan operates like any other commercial entity–for instance, the relationship between the plan and its own employees, *or the plan and its insurers or creditors*, or the plan and the landlords from whom it leases its office space." (emphasis added)). The claims of fraud, breach of fiduciary duty, and negligence arise from that status as note holders, and do not

"touch on" the status of the ESOP as a benefit plan or of any of Plaintiffs as participants in that plan (or on any claim the participants may make against the plan in that capacity). *Cf. Blue Cross*, 187 F.3d at 1054 ("The . . . claims concern only promises that Blue Cross made as a health care plan to its participating physicians. They do not touch on Blue Cross' fiduciary status, or any claims that a beneficiary may make against Blue Cross in that capacity.").

In *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enter., Inc.*, 793 F.2d 1456 (5th Cir. 1986), an ERISA trust sought to invoke the state law of fiduciary duty as a stockholder by bringing a claim against a corporate director who was also a plan fiduciary. Finding no conflict preemption, the court stated:

> The director's duty arises from his status as director; the law imposes the duty upon him in that capacity only. Similarly, the shareholder's rights against the corporate director arise solely from his status as shareholder. That in such a case as ours the director happens also to be a plan fiduciary and the shareholder a benefit plan has nothing to do with the duty owed by the director to the shareholder. The state law and ERISA duties are parallel but independent: as director, the individual owes a duty, defined by state law, to the corporation's shareholders, including the plan; as fiduciary, the individual owes a duty, defined by ERISA, to the plan and its beneficiaries. Thus, the state law does not affect relations between the ERISA fiduciary and the plan or the plan beneficiaries as such; it affects them in their separate capacities as corporate director and shareholder.

Id. at 1468. Here, any duties owed by the plan to the ESOP participant Plaintiffs are also parallel but independent to those owed to them as note holders. The rights and duties under state law between the ESOP and the note holders, whether ESOP participants or not, are distinct from any ERISA-governed relationship between a plan and its participants. The state claims do not affect that regulated relationship.

The third relationship allegedly encroached upon is that between a plan and its fiduciaries, specifically those members of the ESOP Administrative Committee named in the complaint. It is suggested that, as ERISA fiduciaries, the members of the ESOP Administrative Committee were required by ERISA to act "solely in the interest of the [plan's] participants and beneficiaries" for the "exclusive purpose" of "providing benefits to participants and their beneficiaries," as well as "defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). Assuming that the members of the Administrative Committee are fiduciaries within the meaning of 29 U.S.C. § 1002(21)(A), we do not believe that the ERISA-regulated relationship is implicated here. Relying on *Castonguay*, the ESOP contends that the Committee could not act with that undivided loyalty to the plan and its participants and beneficiaries required by ERISA if state law bound its members to account for the interests and obligations asserted by Plaintiffs. In *Castonguay*, an insurer brought state law fraud and negligent misrepresentation claims against an ERISA trustee based on allegedly false statements made while securing for the trust an insurance policy to pay for unmanageable plan payments to participants. 984 F.2d at 1520. Finding the state law claims to be preempted because they raised "precisely the sort of divided loyalty ERISA is meant to prevent," the court concluded: "We hold that, as a matter of federal law, ERISA plan trustees can't be held personally liable for the trust's contracts." *Id.* at 1523-24.

We first note that *Castonguay* was decided prior to the recent trend narrowing the preemptive force of the "relates to" standard under § 1144(a). Moreover, despite the broad language of undivided loyalties in *Castonguay*, it is not immediately apparent how the alleged fraud, breach of duty, and negligence of the Committee members on behalf of the ESOP here would directly conflict with their fiduciary duties under ERISA. Unlike that case, the state law claims here did not arise from transactions directly relating to plan benefits or administration. The conduct at issue concerned the acquisition of Norcal shares in exchange for restricted notes and a subsequent failure to redeem those notes. As such, the only impact that the state law duties might have had on the plan or its beneficiaries is an indirect economic burden, which we have held to be insufficient for conflict preemption. *See Blue Cross*, 187 F.3d at 1052 (holding "the economic effects that . . . claims might have on ERISA plans are not sufficient for preemption to occur"). Finally, as in *Sommers*, the members of the Committee are not being sued in their capacity as plan fiduciaries, but rather as the agents of the ESOP corporate entity that obtained Norcal shares from Plaintiff note holders. State law imposes duties upon them in that capacity only; it does not affect them in their capacity as ERISA plan fiduciaries and thus does not encroach upon any regulated relationship between the plan and its fiduciaries.

Plaintiffs brought suit in their capacity as note holders pursuant to the terms of the Indenture, which by its own terms is governed by California law. Although some Plaintiffs were also ESOP participants and Norcal employees, their claims were brought solely in their capacity as former shareholders and current creditors. Moreover, this financial relationship arose from a transaction explicitly exempted from ERISA regulations and the claims were unrelated to any aspect of a relationship governed by those regulations. The fraud, breach of fiduciary duty, and

negligence causes of action under state law have nothing to do with benefits, the administration of a benefit plan, or any duties imposed by ERISA. No ERISA-regulated relationship is encroached upon by the state law claims. Therefore, the state law claims do not "relate to" an ERISA benefit plan within the meaning of 29 U.S.C. § 1144(a). We conclude therefore that there was no basis to find conflict preemption under ERISA; thus, that the first condition for complete preemption was unsatisfied.

b. Displacement under 29 U.S.C. § 1132(a)

Section 1132(a) provides the exclusive claims that are available under ERISA, as well as by whom and against whom such claims may be brought. *See Toumajian*, 135 F.3d at 656. The Bank, Norcal, and the ESOP all contend that even though the state complaint did not state an ERISA cause of action on its face, the claims of the ESOP participant Plaintiffs should be displaced for purposes of complete preemption analysis because they are encompassed by ERISA's civil enforcement provision, specifically § 1132(a)(2)[7] and (a)(3).[8] We disagree.

---

[7] Section 1132(a)(2) provides that a civil action may be brought "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." Section 1109 states in relevant part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any such losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through the assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem

(continued . . .)

Pursuant to the terms of those subsections, "[p]articipants and beneficiaries, along with plan fiduciaries, depending on their respective roles, are authorized to bring actions for appropriate relief for breach of fiduciary duty or for injunctions or to obtain other appropriate equitable relief to redress an ERISA violation or to enforce the terms of the plan or the provisions of ERISA." *Toumajian*, 135 F.3d at 656; *see also* 29 U.S.C. § 1132(a)(2), (a)(3). Assuredly, a subset of Plaintiffs are plan participants entitled to bring suit under the civil enforcement provision of ERISA. In fact, the ESOP participant Plaintiffs here did precisely that by filing a separate federal complaint contemporaneously with the state court action that was later removed. The claims asserted by all Plaintiffs in the state court action, however, do not fall within the scope of § 1132(a) because those claims are based upon rights that arise under state law in their capacity as former shareholders of Norcal and current note holders under the Indenture, not upon any rights that are conferred, enforced, or governed by ERISA (nor upon a violation of the terms of a plan). As we have previously noted, "[A]n otherwise preempted claim may survive to the extent that it relies on a theory independent of the benefit plan." *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124, 1131 (9th Cir. 1992).

(. . . continued)

> appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. § 1109(a).

[8] Section 1132(a)(3) provides that a civil action may be brought:

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

As discussed at length earlier, the claims of fraud, breach of fiduciary duty, and negligence at issue seek relief for all Plaintiffs on the basis of their reliance in tendering their Norcal shares to the ESOP, the eventual default on their notes, and the failure to redeem or enforce redemption on their notes at the time of the Envirocal transaction. Also, for the purposes of those Plaintiffs who could be considered "parties in interest," the leveraged buyout is an exempted transaction. Plaintiffs are not seeking relief on behalf of an ERISA plan, as required under the express terms of 29 U.S.C. § 1109(a), which is incorporated into § 1132(a)(2), and our case law. *See Toumajian*, 135 F.3d at 656 (citing *Buster v. Greisen*, 104 F.3d 1186, 1189 (9th Cir. 1997)). Nor do Plaintiffs' claims derive from a breach of "any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter." § 1109(a). Therefore § 1132(a)(2) is inapplicable. Moreover, none of these Plaintiffs "seek[s] relief as a participant, beneficiary, or fiduciary to enjoin any act or obtain any other equitable relief to redress any violations or enforce any provisions of ERISA." *Toumajian*, 135 F.3d at 656. Therefore § 1132(a)(3) is not applicable either.

Norcal and the ESOP seek to distinguish *Toumajian* on the ground that the complaint at issue in that case asserted state law claims for professional malpractice against a non-fiduciary service provider, whereas in this case ERISA fiduciaries were named in the complaint. But irrespective of the status of any of Defendants as the fiduciaries of an ERISA plan, none of the state law claims can be characterized as fiduciary breach claims within the scope of ERISA's civil enforcement provision. Simply put, the claims do not concern any plan fiduciaries in their capacity as such. Nor do they otherwise fall within the scope of ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). We conclude therefore that there was no basis for displacement under

ERISA; thus, the second condition for complete preemption was also unsatisfied.

III. CONCLUSION

In summary, we conclude that neither of the necessary conditions for complete preemption under ERISA was satisfied here. Plaintiffs brought suit based on state law theories of fraud, breach of fiduciary duty, and negligence that cannot be said to "relate to" an ERISA plan within the meaning of 29 U.S.C. § 1144(a); nor are the claims encompassed within the scope of ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). It is of no consequence that some Plaintiffs were also employees of the plan sponsor and plan participants at the time of suit because the claims have nothing to do with their status as such. Like all Plaintiffs, the ESOP participants brought suit in state court solely in their capacity as former shareholders and current note holders pursuant to the terms of the Indenture. Thus, the state law claims have no bearing on any ERISA-governed relationship and are not displaced by ERISA's civil enforcement scheme. Because there is no basis for complete preemption under ERISA, there was no federal question subject matter jurisdiction to support removal. And without a federal question, there was no anchor for the assertion of supplemental jurisdiction.

Accordingly, the judgment in each case is vacated and these cases are remanded to the district court with directions that, in No. 99-17040 and No. 99-17474, the case be remanded to state court and, in No. 99-17132, the action be dismissed without prejudice. Plaintiffs-Appellants in No. 99-17040 shall recover their costs on appeal from Defendants-Appellees. The parties in No. 99-17132 shall bear their own costs on appeal.

VACATED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JULIO ABRAHAM, ET AL.,

Plaintiffs

v.

NORCAL WASTE SYSTEMS, INC., ET AL.,

Defendants.

C-94-3076 CAL

San Francisco, CA

November 18, 1994

Transcript of Proceedings

Before LEGGE, District Judge.

The Court: * * * The plaintiffs' motion to remand here is in 94-3076, and the assertion of jurisdiction by the defendants, which I think is correct, is that three of the state claims are preempted by ERISA: the constructive fraud claim, the fiduciary duty claim, and the negligence claim. And I don't think that this distinction among the parties, that is, that we have some note holders who are covered by – who are covered by ERISA, and we have some who are not, and that the suit is by people in their capacity as note holders, rather than their capacity as ERISA beneficiaries, really

answers the question, because I think the sweep of ERISA is a lot broader than that.

I think the sweep of ERISA, for all preemption and jurisdictional purposes, is whether common-law causes of action could or would, directly or indirectly, interfere with the relationships that are related by ERISA; in essence, by creating duties on the part of ESOP defendants that could be potentially inconsistent with the duties imposed by ERISA.

I think – with that preemption, I think the rest of the claims and the rest of the parties stay here under, whether you want to call it pendent jurisdiction, or a later test, supplemental jurisdiction. I think the jurisdiction is here.

* * *

(PROCEEDINGS ADJOURNED)

Certificate of Reporter

I, Raymond Linkerman, the undersigned official reporter of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, do hereby certify:

That the foregoing transcript, pages numbered 1 through 31 inclusive, constitute a true, full and correct transcript of my shorthand notes taken as such official reporter of the proceedings hereinbefore entitled, and reduced to typewriting to the best of my ability.

/s/ Raymond Linkerman
Raymond Linkerman

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-17132, 99-17040 and 99-17474

[Filed November 14, 2001]

JULIO ABRAHAM, *et al.*,
Plaintiffs-Appellants,
v.
NORCAL WASTE SYSTEMS INC, *et al.*,
Defendants,
and
BANK OF AMERICA,
as successor to Security Pacific National Bank,
the Indenture Trustee,
Defendant-Appellee.

JULIO ABRAHAM, *et al.*,
Plaintiffs-Appellees,
v.
NORCAL WASTE SYSTEMS INC, *et al.*,
Defendants-Appellees,
THE BANK OF AMERICA,
Defendant-Appellant,
and
CHASE MANHATTAN BANK, N.A.,
BANK OF CALIFORNIA,
CALIFORNIA FEDERAL BANK,
Defendants.

BANK OF AMERICA NT & SA,
as successor in interest by merger with
Security Pacific National Bank, Indenture Trustee,

Plaintiff-Appellant,

v.

NORCAL SOLID WASTE SYSTEMS EMPLOYEE
STOCK OWNERSHIP PLAN AND TRUST,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California

D.C. Nos. CV 94-3076 CAL, 99-1175 CAL

(November 14, 2001)

Before THOMPSON, O'SCANNLAIN, and TASHIMA, Circuit Judges.

Bank of America's request for judicial notice is denied.

The panel has voted to deny the petitions for panel rehearing. Judges O'Scannlain and Tashima vote to deny the petitions for rehearing en banc and Judge Thompson so recommends. The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote en banc rehearing. *See* Fed. R. App. P. 35(b).

The petitions for panel rehearing and the petitions for rehearing en banc of Bank of America and Norcal Waste Systems, Inc. Employee Stock Ownership Plan and Trust are denied.

STATUTORY PROVISIONS INVOLVED

Section 409(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1109(a), provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

Section 502(a) of ERISA, 29 U.S.C. §1132(a), provides in relevant part:

> Persons empowered to bring a civil action. A civil action may be brought— . . . (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title; (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Section 514(a) of ERISA, 29 U.S.C. §1144(a), provides in relevant part:

> Supersedure; effective date. [T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under 1003(b) of this title.

PARTIES TO THE PROCEEDING (CONT'D)

The Plaintiffs below, Respondents herein, were Julio Abraham, Paul Agazzi, Giusppe Aiello, Bennie Anselmo, Sr., Thomas Arens, Renato Avanzino, Lily Bacigalupi, Peter Bacigalupi, Jr., David E. Ballestrazze, Mike Ballestrazze, William Bandettini, Mary Barieri, John Baroni, Pietro Battilana, Antoinette Bavoso, Michael J. Biagini, William Biondini, Sr., Franklin Bishop, Herbie Boyd, Madeline Brandi, Paul Brunetta, Natalio Cadematori, Flavio Calcagno, Fernando Cambri, Rita Canevari, Thomas J. Canevari, Primo Capella, Costantino Caramatti, John Caruso, Amy M. Catelli, Getulio Catena, Frank Chappellone, Edward Chiappari, Attilio Chiesa, Estate of George Codino, Quanito Cuneo, Ugo Cuneo, Victor D'Agnolo, Ray Dal Pogetto, Casimiro Damele, Alfred De Martini, Eugene De Martini, Gino De Martini, Paul De Martini, Adolfo Del Carlo, Vince Delfino, Lawrence Della Cella, Mary Della Cella, Susan Della Cella, Anita Delucchi, Mario Delucchi, Normal Depaoli, Angelo L. Devincenzi, Gloria Devincenzi, James D. Devincenzi, Vicki Duhagon, Estate of J.B. Ellis, Alipio Fatica, Elmo Fatica, Giobatta Fazio, Leon Ferguson, Ana Ferrando, Luciano Ferrari, Charolette Fini, James Firpo, Sergio Folena, Alesio Foppiano, Fortunato Conti, Eva Franceschi, Pete Franceschi, Estate of Anna Marie Franco, Giacomo Franco, John P. Franco, John Frederick, Dorothea Garaventa, Edward Germano, Benedetto Ghigliazza, Bernardo Ghigliazza, Frederico Ghiglieri, Anna Ghirardozzi, Anna Ghirardozzi, Gloria Ghirardozzi, Lou Giannone, Carlo Ginocchio, Hugo Giovannini, Sisto Giuliacci, Ubaldo Gobbo, Mario Grelli, Piero Grelli, Barbara Hamilton, Orel Jackson, Jr., Pearlie B. Lee, Harold Lopez, Joseph Lucchetti, Luigi Sciamanna, Attilio Malatesta, Emil Mangini, Louis Matteucci, Roger Micheli, Luis Morales, Giacomo Moscone, John Moscone, Angelo Musante, Alvaro Nardi, Estate of Michele Nardi, Sandy Obertello, Tony Oneto, Ivan Oplanic, Vincenzo

Pasquinelli, Antonio Passetti, Quinto Passetti, Alfredo Perli, Otto Perucci, Robert Pessagno, Virginia Pessagno, Rodovan Pesusic, Vonda Peverada, Hugo Pisani, Armando Pucci, Grace Puccinelli, Sergo Puccinelli, Flora Raggio, Inez Rajewski, Jack Rajewski, Louie J. Ratto, Paul Ratto, Peter Ratto, Angelo Ricchetti, Francesco Rissoto, William S. Roberts, Ernest Ronzani, Raniero Roselli, Mario Rossi, Albert Sciamanna, William Segarini, Ray Sharp, Sr., Dante Steccone, Mario Steccone, Luis Stella, Estate of Billy Terry, Luis M. Torres, Tom Traverso, Linda Tregenza, Judy Vucci, Paul Worden, and Tony Zappettini.